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Sierra Club, Utah Chapter v. Utah Solid and Hazardous Waste Control Board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SIERRA CLUB, UTAH CHAPTER, Petitioner, v. UTAH SOLID AND HAZARDOUS WASTE CONTROL Board, Respondent,	)	Case No. 920485-CA Decision No. Docket No.

REPLY BRIEF OF PETITIONER

PETITION FOR REVIEW FROM AN ORDER OF THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

Argument Priority: 15

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INTRODUCTION

The briefs submitted by Respondent (the "Board") and Intervenor ("USPCI") present basically the same arguments in opposition to the position advanced by the Sierra Club. To organize and simplify petitioner's reply to those arguments, petitioner will address these arguments under the following general headings: (i) Standard of Review; (ii) Interpretation of Regulation; and (iii) Appropriate Remedy.

ARGUMENT I

STANDARD OF REVIEW: CORRECTNESS-OF-ERROR AND SUBSTANTIAL EVIDENCE ARE THE STANDARDS OF PETITIONER REVIEW THAT SHOULD BE APPLIED IN THE PRESENT CASE.

The Board argues that this Court should employ the reasonableness standard set forth by the Utah Supreme Court in Morton International, Inc. v. Auditing Div., 814 P.2d 581, 587-89 (Utah 1991). Under Morton, the reviewing court is allowed to review an agency's decision under a reasonableness standard in those instances in which the agency is given discretion to interpret or apply the law. The Board reasons that the statutory grant of authority to the Board to establish criteria for citing commercial hazardous waste facilities provides an implicit grant

of discretion to the Board to interpret its rules and regulations.[1]

As a general rule, an agency's interpretation of its own regulation is entitled to judicial deference. See Concerned Parents of Stepchildren v. Mitchell , 645 P.2d 629, 633 (Utah 1982). However, administrative regulations like the citing criteria at issue in the present case cannot be ignored or followed by the agency to suit its own purposes. State, Etc. v. Utah Merit System Counsel, 614 P.2d 1259, 1263 (Utah 1980).

In Morton, the Utah Supreme Court announced the dispositive factor in determining the appropriate standard of review to be whether the agency, by virtue of its experience or expertise, was in a better position than the courts to give effect to the regulatory objective to be achieved. Morton International, Inc. v. Auditing Div., 814 P.2d at 586.

As the Morton Court explained:

> We do not defer to the (agency) when construing statutory terms or when applying statutory terms to the facts unless the construction of the statutory language or the application of the law to the facts should be subject to the (agency's) expertise gleaned from its accumulated practical, first-hand experience with the subject matter.

Id. at 586-87.

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[1] USPCI appears to echo the argument presented by the Board on this issue. It argues that the statutory directive found in Utah Code Ann. § 19-6-105(3) to establish criteria carries with it an implied discretion relating to application of the criteria.

The specific regulatory language at issue in the present case states:

> The application shall also contain evidence that emergency response plans have been coordinated with local and regional response personnel.

Utah Admin. R.315-3-23(c)(1).

The regulation in question does not contain technical terms for which the agency's expertise rather than the court's would apply. The language in question is no different than that employed in numerous statutes, contracts and other writings that courts deal with on a daily basis. Therefore, even under the Morton standard, this Court should apply the less differential correction-of-error standard. See also Savage Industries v. Utah State Tax Commission, 811 P.2d 664, 668 (Utah 1991).

Once this Court determines the appropriate interpretation of the regulatory language it must then determine if substantial evidence exists to support the Board's ultimate conclusions. See First National Bank of Boston v. County Board of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

ARGUMENT II

INTERPRETATION OF REGULATION: EVIDENCE OF COORDINATION WITH NON-AFFILIATED LOCAL AS WELL AS REGIONAL EMERGENCY RESPONSE PERSONNEL IS REQUIRED UNDER THE APPLICABLE REGULATION.

Because of the limited quantity and nature of the evidence presented to the Board on the issue of coordination of

emergency response plans, interpretation of R.315-3-23(c)(1) becomes the determinative issue in this appeal. The Board and USPCI argue that the mandate of R.315-3-23(c)(1) (that emergency response plans have been coordinated with local and regional response personnel) was fulfilled in this case in one of two ways.[2] In the first instance, they argue that intracompany coordination between the three USCPI business locations in Tooele County constituted adequate evidence of local coordination. Secondarily, they argue that, based on the distance between the site and the nearest municipality, local coordination was not necessary.[3]

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[2] At page 21 of its brief, USPCI presents an argument that the Board did not rely on evidence of prospective agreements. Specifically, USPCI points to the testimony of Cheryl Heying to support its argument. Ms. Heying was questioned directly on the issue presently before this Court. She testified that the emergency response assessment found in the contingency plan attachment constituted evidence of compliance with R.315-3-23(c)(1). Index Part B. Doc. 55 (March 17, 1992 Hearing Transcript at 514-515).

[3] The Board's and USPCI's argument that no coordination was required at the local level ignores the express provisions of R.315-3-23(d). Subparagraph (d) provides that exemptions from the criteria may be granted upon application after an appropriate public comment period. A request to dispense with the requirement of local coordination would fall squarely within the reach of that subparagraph. Any interpretation of R.315-3-23 must harmonize with rather than override that separate provision.

Sierra Club has conceded that adequate evidence was presented to the Board to support a finding that coordination with regional response personnel had been completed prior to August 14, 1990. That coordination was embodied in part in an agreement between USPCI and Tooele County entitled "USCPI-Tooele County Impact Mitigation Agreement (Index, Part B, Doc. 56, Attachment B)". This Agreement, which was entered into in 1988, provides for the coordination of the county's emergency response personnel.

In addition, the Impact Mitigation Agreement provides that USPCI shall pay impact mitigation fees to Tooele County to compensate the county for the cost of deploying its emergency response personnel.

There can be no question that the payment of impact mitigation fees is a critical component of the Impact Mitigation Agreement. The nature of the business engaged in by USPCI and others who build, operate and maintain hazardous waste facilities carries with it significant risk that the handling of the hazardous materials will result in emergency situations that threaten the safety and welfare of the populace.

Equally important is the risk that an area's populace will be burdened with the extraordinary expense inherent in any response to this type of emergency situation. The arguments presented by the Board and USPCI are addressed exclusively to the

former concern, to wit, the safety and welfare of the people in Tooele County.

The Board and USPCI argue that the portion of the application that states that personnel at the other USCPI locations will be trained and available to respond in emergency situations fulfills the requirement for coordination with local personnel.

However, the existence of trained personnel, either at the specific site or at other locations operated by an applicant, does not address the adjacent municipalities' concerns about the financial burden created by their inevitable response to emergency situations caused by the operation of the facility. No one has argued, nor could they, that municipal response personnel will not be involved in the overall emergency response. In fact, USPCI recognizes response personnel from local communities will be involved when it states in its brief that emergency response coordination shall result in contacts with Tooele County, Tooele City, Grantsville City, the Utah Highway Patrol and appropriate medical services. (USPCI's Brief pp. 18-19).

When viewed in its entirety, R.315-3-23 establishes specific criteria that must be met by an applicant in siting a hazardous waste facility. Subsection (b) of the rule prohibits the siting of such a facility in certain, specific locations. Subsection (b)(xiii) prohibits the location of a hazardous waste

facility within five miles of existing permanent dwellings, residential areas, etc.

Subsection (c) of R.315-3-23 addresses emergency response and transportation questions. That subsection is divided into three parts. The first requires an assessment of the availability and adequacy of emergency response services. Such an assessment must be included in the plan approval application. Subsection (c)(1) also requires that the application contain evidence that emergency response plans have been coordinated with local and regional response personnel.

Subsection (c)(2) of R.315-3-23 requires the applicant employ trained emergency response personnel that are capable of responding to emergencies at the site and along transportation routes within the state. Obviously, USPCI's personnel at the site and at USCPI-Grassy Mountain and USCPI-Lakepoint fulfill that requirement.[4]

These requirements regarding the siting of a hazardous waste facility implicitly recognize that such a facility shall

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[4] Subsection (c)(2) requires details of the proposed emergency response capacity be given in the plan approval application. The Board argues that the portions of the application that contain a description of this capacity also fulfill the requirements of subsection (c)(1). (Respondent's Brief pp. 14-15). Coordination with local emergency response personnel is a separate and distinct requirement of the regulation which cannot be merged with another distinct requirement, to wit, emergency response personnel maintained by the applicant.

impact cities and counties adjacent to any potential location. The Board's regulations present specific prohibitions against locating a facility in certain defined areas. In addition, the siting criteria require an assessment of non-affiliated emergency services relative to the proposed location and pre-application coordination with non-affiliated local and regional emergency response personnel.

The criteria found in R.315-3-23(c)(1) represent a means by which municipalities and counties become participants in the site selection process.[5]

The Utah Supreme Court has recognized the broad powers granted to counties and cities to provide for the health and welfare of their citizens. See State v. Hutchinson, 624 P.2d 1116 (Utah 1980). As the majority opinion in Hutchinson stated:

> The grant of general welfare power to counties is duplicated by a similar grant to cities . . .

Id. at 1122.

Quoting a leading authority on municipal government the majority of the Court in Hutchinson explained:

> . . . courts uniformly regard the (welfare) clause as ample authority for a reasonable exercise, in good faith, of broad

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[5] R.315-3-23(c) expressly recognizes that Titles 10 and 17 of the Utah Code Annotated gives cities and counties authority for local use planning and zoning and provides that cities and counties may establish additional requirements for the siting of hazardous waste facilities.

> and various municipal activity to protect the health, morals, peace and good order of the community to promote its welfare in trade, commerce, industry and manufacturing, and to carry out every appropriate object contemplated in the creation of the municipal corporation.

Id. at 1125.

The requirement of pre-application coordination with non-affiliated local response personnel provides municipalities that will be impacted by the site selection an avenue for active participation in the siting process. As pre-application participants the municipalities can effect their broad purpose and protect their citizenry from the physical and financial burdens imposed by the risks inherent in applicant's business.

All parties recognize that Tooele County was allowed to participate in this process and emerged from that participation with an agreement that provided direct monetary compensation from USPCI in the form of impact mitigation fees. Both the Board and USPCI ask this Court to interpret R.315-3-23(c)(1) by eliminating the necessity of similar coordination between the applicant and proximate municipalities.[6]

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[6] Both the Board and USPCI argue the fact that Grantsville and Tooele are not next to the proposed site provides justification for the Board interpreting the term "local" out of R. 315-3-23(c)(1). Grantsville is located approximately 37 miles from the proposed location and Tooele is approximately 47 miles away. USCPI-Lakepoint which is presented by both parties as evidencing local coordination is located 50 miles from the site. Depending on the access route used for any particular shipment of hazardous waste, either Grantsville or Tooele

By eliminating the requirement of pre-application coordination, the Board would allow the applicant to impose emergency response plans upon the surrounding municipal governments as its whim. Exclusion of this requirement from the siting criteria would leave the municipalities at the mercy of the applicant in negotiating response plans after the facility is built and operating. Thus, while Tooele County would receive mitigation fees from USPCI neither Tooele City nor Grantsville City would receive any compensation for expenses incurred in local response to an emergency situation. This would result in the municipal tax base being burdened with extraordinary expenses and no way to recoup them from the applicant.

Such a result was not the intent behind the specific siting criteria in question and should not be the policy of the Board in enforcing that criteria.

Under any standard of review this Court should find prejudicial error in the Board's failure to require evidence of

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could be the closest location for emergency response personnel. Similarly, the lack of an adjacent municipality renders either of those cities as the most likely candidate for an emergency medical destination and the provider of other services necessitated by an emergency situation.

pre-application coordination with non-affiliated local emergency response personnel.[7]

ARGUMENT III

APPROPRIATE REMEDY: A JUDICIAL DETERMINATION THAT THE APPLICATION WAS NOT COMPLETE ON AUGUST 14, 1990 IS THE APPROPRIATE REMEDY UNDER THE FACTS OF THE PRESENT CASE.

The Board and USPCI argue that if this Court finds that the application did not comply with the criteria found in R.315-3-23(c)(1), then it should remand the matter back to the Board to determine whether the application was complete on August 14, 1990.

Utah Admin. R.315-3-23(e) states:

> The plan approval application shall not be considered complete until the applicant demonstrates compliance with the criteria given herein.

Following the adjudicative hearings the Board expressly concluded as a matter of law that the CIF Operation Plan application and the CIF Plan Approval complied with the siting criteria of R.315-3-23(c)(1), (2) and (3), and the application was complete on August 14, 1990 with respect to those requirements. (Index, Part B, Doc 61, Conclusions of Law ¶ 8).

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[7] USPCI argues that the criteria in question does not require a written agreement or other writing. However, in his testimony before the Board, the executive secretary stated that the criteria in question requires written evidence of pre-application coordination in the form of some written agreement. (Index, Part B, Doc 55, March 17, 1992 Hearing Transcript at 441, lines 3-5).

If the criteria found in R.315-3-23(c)(1) were not met, the application could not be complete on August 14, 1990 and the Board's conclusion to the contrary would be erroneous. R.315-3-23(c)(1) requires evidence that emergency response plans have been coordinated at the local and regional level before the application is filed.

It is obvious that a requirement for pre-application coordination cannot be complied with after the application has been filed or after it has been determined to be complete. The Board and USPCI argue that the application process recognizes that materials and information will be supplemented throughout the process. However, something cannot be supplemented if it was not in existence in the first place.

The complete lack of any evidence of coordination of emergency response plans with unaffiliated local emergency response personnel creates an insurmountable gap in the application that renders it incomplete.

Based on the record before it, this Court can determine whether the application was or was not complete on August 14, 1990. If this Court adopts the interpretation of R.315-3-23(c)(1) advanced by the Board and USPCI the application was complete. If the Court adopts the interpretation advanced by the Sierra Club, the application was not complete as a matter of law and the matter should be remanded with appropriate instructions.

CONCLUSION

The arguments advanced by both the Board and USPCI recognize that municipalities near the proposed hazardous waste facility site shall be involved in emergency response situations. Notwithstanding this recognition, the Board and USPCI ask this Court to endorse an interpretation of R.315-3-23(c)(1) which would eliminate the necessity of USPCI submitting evidence that emergency response plans had been coordinated with emergency response personnel at the municipal level.

The Board and USPCI acknowledge that no such coordination took place, but ask this Court to uphold the erroneous agency action and USPCI's non-compliance with the applicable siting criteria by interpreting the specific requirement out of the regulation.

The evidence before the Board and this Court establishes a complete lack of emergency response coordination between USPCI and any independent third parties at the local level. Without evidence of the required local coordination the application could not be complete and the Board's factual and legal conclusions to the contrary constitute reversible error.

The Sierra Club respectfully requests that this Court reverse the Board's error, declare the application incomplete and remand the matter to the Board with direction to re-open the application process.

DATED this 5th day of March, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 1993, I caused to be hand delivered a true and correct copy of the foregoing Reply Brief of Petitioner, to:

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